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# Report of the Independent Expert on the promotion of a democratic and equitable international order*

## Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the thematic report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, pursuant to Council resolution 36/4.

* The annexes to the present report are circulated as received, in the language of submission only.

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# I. Introduction

1. The present report of the Independent Expert on the promotion of a democratic and equitable international order is submitted to the Human Rights Council in compliance with its resolution 36/4, requesting the Independent Expert to prepare a final report on his studies conducted during the last six years of his mandate, and to share it with the Council at its thirty-seventh session. In the report, the Independent Expert surveys his six previous reports to the Council and his six reports to the General Assembly and makes recommendations on issues addressed by the mandate, such as the models of democracy, the right of self-determination, the social responsibility of business enterprises, bilateral investment treaties, free trade agreements, military expenditure, tax evasion, reform of the United Nations system and the obligations of intergovernmental organizations.

2. The Independent Expert recalls that the mandate was established pursuant to resolution 18/6 of 29 September 2011, which laid down the terms of reference of a truly all-inclusive rapporteurship for the promotion of a democratic, equitable and peaceful international order, a universal goal that had already found expression in numerous General Assembly resolutions following the historic resolution 3201 (S-VI) of 1 May 1974 on the declaration on the establishment of a new international economic order, which reflects the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States annexed to General Assembly resolution 2625 (XXV) of 24 October 1970.

3. During the first six years of the mandate, the Independent Expert wrote 12 reports addressing cross-cutting human rights issues pertinent to the realization of a democratic and equitable international order, including various models of democracy, the right of self-determination, the social responsibility of business enterprises, bilateral investment treaties, free trade agreements, military expenditure, tax evasion, tax havens, tax competition, enhanced coordination with international financial institutions, including the World Trade Organization (WTO), the World Bank and the International Monetary Fund (IMF), national and international protection of human rights defenders, including whistle-blowers, and the reform of the United Nations system.

4. The 12 reports bear witness to the added value of the mandate as a holistic directive to cast human rights in a coherent framework, which invites cross-fertilization with other special procedure mandate holders. In the reports, the Independent Expert took due account of the findings and recommendations of other rapporteurs and working groups, including those on international solidarity, extreme poverty, the right to health, the right to food, the right to housing, foreign debt, illicit financial flows, unilateral coercive measures, indigenous peoples, business and human rights, mercenaries and arbitrary detention. The Independent Expert also endorsed new standard-setting initiatives such as the Declaration on the Right to Peace,[1] the declaration on the rights of peasants and other people working in rural areas,[2] a binding legal instrument on transnational enterprises[3] setting out minimum social and environmental standards, the criminalization of environmental destruction, a global bill of rights, an international court on human rights and the creation of a world parliamentary assembly.[4] In the reports, the Independent Expert highlighted the democratic deficits in many fields and called for enhanced transparency and accountability by all governmental and non-State actors. He also made clear that the exercise of power, particularly economic power, should be subjected to some kind of democratic control, so that the protective functions of the State were not undermined.

5. The mandate is both timely and necessary, especially since it illustrates the interrelatedness and interdependence of human rights and the natural convergence of civil,

[1] General Assembly resolution 71/189, annex.

[2] A/HRC/19/75, annex.

[3] See www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx.

[4] See http://en.unpacampaign.org/394/uns-independent-expert-alfred-de-zayas-time-for-a-world-parliamentary-assembly.

cultural, economic, political and social rights, and demonstrates that the so-called "fragmentation" of international law does not permit circumventing the holistic application of the Universal Declaration of Human Rights and the core human rights treaties. There can be no "legal black hole" in the field of human rights, and in the twenty-first century the international human rights treaty regime permeates all fields of activity and imposes duties not only on States, but also on non-State actors. By joining the dots, this comprehensive mandate gives concrete expression to the purposes and principles of the United Nations and formulates pragmatic recommendations to States, intergovernmental organizations, non-governmental organizations (NGOs), universities and other private actors. It is in this spirit, that the Independent Expert campaigned in the diplomatic community for the creation of the new mandates on the right to development and on the right to privacy. Today, the Independent Expert calls for the establishment of new rapporteurships on the right of self-determination and on the right to peace, both aimed at addressing grievances in a timely fashion so as to promote local, regional and international peace and development.

6. In addition to drafting the reports, the Independent Expert has also issued more than a hundred press releases and media statements — and some fifty longer essays or "information notes" — that have sought to illustrate the variety of issues that have an impact on the international order.

7. From 26 November to 9 December, the Independent Expert carried out the mandate holder's first official visit to the Bolivarian Republic of Venezuela and Ecuador.[5] Among the aims of the visit was to study how the alternative social and economic models of the member States of the Bolivarian Alliance for the Peoples of Our America, in particular the Bolivarian Revolution in Venezuela and the Citizens' Revolution in Ecuador, have had an impact on the international order, and vice versa. This two-country visit provided an opportunity to explore the big picture challenges faced by all Governments, in particular how economic, social and cultural rights can be given greater emphasis without restricting the enjoyment of civil and political rights.[6] Encouragingly, shortly after the visit, some action had already been taken that was consistent with the preliminary recommendations of the Independent Expert.[7]

8. It is to be expected that, over the coming years, the international order mandate will continue to unfold its potential. Admittedly, achieving a democratic and equitable international order requires overcoming formidable obstacles, including the misplaced priorities of some Governments and international organizations, bias in favour of civil and political rights, the prevailing "demophobia" in many countries in which Governments do not respond to the wishes of their citizens and ban or even criminalize referendums, the curses of positivism, selectivity and double standards and the propensity to go for short-term solutions instead of addressing their root causes. Substantively, the continued existence of secrecy jurisdictions, the impunity of transnational corporations, private security companies and other private sector actors are continuing impediments.

9. In addition to tackling these concerns, future mandate holders may wish to address the impact on a democratic and equitable international order of intergovernmental groupings, such as the Group of Seven and the Group of 20, private associations, like the United States Council on Foreign Relations, the World Economic Forum, the Bilderberg Group and the Trilateral Commission, and others, which are sometimes perceived as promoting world government outside the United Nations context,[8] and the World Social Forums since Porto Alegre, Brazil, in 2001.

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[5] See www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22457&LangID=E.

[6] The report on these visits is due to be presented at the thirty-eighth session of the Council. A press release following the mission is available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22531&LangID=E.

The preliminary observations of the Independent Expert are available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22530&LangID=E.

[7] See www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22569&LangID=E.

[8] See, e.g., Robert Eringer, *The Global Manipulators* (Bristol, Pentacle Books, 1980); Ian N. Richardson, Andrew P. Kakabadse and Nada K. Kakabadse, *Bilderberg People: Elite Power and*

10. Major global challenges that should be studied from the international order perspective include achieving the Sustainable Development Goals and the 2030 Agenda for Sustainable Development, universal peacekeeping and the role of the United Nations peacekeeping missions, the growing impact of globalization on the enjoyment of human rights, the consequences of climate change, cultural imperialism, economic neocolonialism, commodities speculation, vulture funds, and the unregulated activities of credit-rating agencies and media conglomerates. It would also be important to explore how the great world religions and non-denominational humanist and ethical unions could proactively advance a more peaceful, more democratic and more equitable international order. Moreover, the mandate holder might also explore the role of peoples' tribunals in ending impunity and helping to break the blackout on war crimes by the powerful. The mandate would also benefit from additional country visits, although it remains largely epistemological and primarily entails the creation and interpretation of norms with a view to formulating pragmatic recommendations.

11. A democratic and equitable international order is one in which the Charter of the United Nations is recognized as the world constitution, and the International Court of Justice operates as the world constitutional court, with due deference to the Charter's "supremacy clause".[9] Hitherto, the advisory competence of the Court has been underutilized and the enforcement of its advisory opinions has been particularly disappointing. It is imperative for the credibility of the Court and the United Nations itself that States undertake to respect General Assembly resolutions as well as the Court's judgments and advisory opinions. Pursuant to the doctrine of "implied powers", the Court should also exercise the competence to issue advisory opinions *motu proprio*. Similarly, the Secretary-General should be given the competence to ask the Court to issue advisory opinions on legal issues requiring an authoritative judicial resolution.

12. A democratic and equitable international order necessarily functions on the basis of multilateralism and international solidarity. It aims at promoting a culture of peace and dialogue among nations and peoples, fully respecting the sovereignty of States and ensuring that civil society in all countries has ample space to express itself and to enjoy its individual and collective rights and pursue its traditions, culture and identity. It bears repeating that a democratic and equitable international order is one in which peoples and nations enjoy equitable representation, not only in the General Assembly, but also in regional and international financial institutions, in which they can exercise their right of self-determination, in which the right to peace is recognized in its individual and collective dimensions and in which unilateral coercive measures are prohibited.

13. As the Heads of State and Government at the World Summit in September 2005 reaffirmed, democracy is a universal value based on the freely expressed will of people to determine their political, economic, social and cultural systems and their full participation in all aspects of their lives. They also stressed in the outcome document that democracy, development and respect for human rights and fundamental freedoms were interdependent and mutually reinforcing, and pointed out that, while democracies shared common features, there was no single model of democracy.

## II. Principles of international order

14. The reports of the Independent Expert have been guided by numerous General Assembly resolutions, notably resolutions 2625 (XXV) and 3314 (XXIX), which, together with the Charter, propound a vision of a democratic and equitable international order. Based on the work of the mandate holder, the following should be generally recognized as principles of international order:

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*Consensus in World Affairs* (Abingdon, Routledge, 2011), and Holly Sklar (ed.), *Trilateralism: The Trilateral Commission and Elite Planning for World Management* (Boston, South End Press, 1980).

[9] This provides that the Charter should prevail in the event of a conflict between the obligations of States as United Nations members and their obligations under other international agreements (Charter, Article 103).

(a) *Pax optima rerum*.[10] The noblest principle and purpose of the United Nations is promoting peace, preventively and, in case of armed conflict, facilitating peacemaking, reconstruction and reconciliation;

(b) The Charter takes priority over all other treaties (Article 103);

(c) Human dignity is the source of all human rights, which, since 1945, have expanded into an international human rights treaty regime, many aspects of which have become customary international law. The international human rights treaty regime takes priority over commercial and other treaties (see A/HRC/33/40, paras. 18–42);

(d) The right of self-determination of peoples constitutes *jus cogens* and is affirmed in the Charter and in common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The rights-holders of self-determination are peoples. The duty bearers are States. The exercise of self-determination is an expression of democracy and attains enhanced legitimacy when a referendum is conducted under the auspices of the United Nations. Although the enjoyment of self-determination in the form of autonomy, federalism, secession or union with another State entity is a human right, it is not self-executing. Timely dialogue for the realization of self-determination is an effective conflict-prevention measure (see A/69/272, paras. 63–77);

(e) Statehood depends on four criteria: population, territory, government and the ability to enter into relations with other countries. While international recognition is desirable, it is not constitutive but only declaratory. A new State is bound by the principles of international order, including human rights;

(f) Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State. Already in 1510 the Spanish Dominican Francisco de Vitoria,[11] Professor of Law in Salamanca, stated that all nations had the right to govern themselves and could accept the political regime they wanted, even if it was not the best:[12]

(g) Peoples and nations possess sovereignty over their natural resources. If these natural resources were "sold" or "assigned" pursuant to colonial, neocolonial or "unequal treaties" or contracts, these agreements must be revised to vindicate the sovereignty of peoples over their own resources;

(h) The principle of territorial integrity has external application, i.e. State A may not invade or encroach upon the territorial integrity of State B. This principle cannot be used internally to deny or hollow out the right of self-determination of peoples, which constitutes a *jus cogens* right (see A/69/272, paras. 21, 28, 69 and 70);

(i) State sovereignty is superior to commercial and other agreements (see A/HRC/33/40, paras. 43–54);

(j) States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations (Charter, Art. 2 (4));

(k) States have a positive duty to negotiate and settle their international disputes by peaceful means in such a manner that international peace, security and justice are not endangered (Charter, Art. 2 (3));

(l) States have the duty to refrain from propaganda for war (International Covenant on Civil and Political Rights, art. 20 (1));

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[10] Peace is the highest good (motto of the Peace of Westphalia, 1648).

[11] See http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1325&context=ilj.

[12] See www.academia.edu/7222085/The_Foundations_of_Human_Rights_Human_nature_and_jus_gentium_as_articulated_by_Francisco_de_Vitoria.

(m) States shall negotiate in good faith for the early conclusion of a universal treaty on general and complete disarmament under effective international control (A/HRC/27/51, paras. 6, 16, 18 and 44);

(n) States may not organize or encourage the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State;

(o) States must refrain from intervening in matters within the national jurisdiction of another State;

(p) No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind;

(q) No State may organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State;[13]

(r) The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention;

(s) The ontology of States is to legislate in the public interest. The ontology of business and investment is to take risks to generate profit. A treaty that stipulates one-way protection for investors and establishes arbitration commissions that encroach on the regulatory space of States is by nature *contra bonos mores*. Hence, the investor-State dispute settlement mechanism cannot be reformed; it must be abolished (see A/HRC/30/44, paras. 8, 12, 17 and 53, and A/70/285, paras. 54 and 65);

(t) States must respect not only the letter of the law, but also the spirit of the law, as well as general principles of law (Statute of the International Court of Justice, Article 38), such as good faith, the impartiality of judges, non-selectivity, uniformity of application of law, the principle of non-intervention, estoppel (*ex injuria non oritur jus*), the prohibition of the abuse of rights (*sic utere tuo ut alienum non laedas*) and the prohibition of contracts or treaties that are *contra bonos mores*. It is not only the written law that stands, but the broader principles of natural justice as already recognized in Sophocles' *Antigone*, affirming the unwritten laws of humanity, and the concept of a higher moral law prohibiting unconscionably taking advantage of a weaker party, which could well be considered a form of economic neocolonialism or neo-imperialism (see annex II below);

(u) States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in order to maintain international peace and security and to promote international economic stability and progress. To this end, States are obliged to conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention. States should promote a culture of dialogue and mediation;

(v) The right to access reliable information is indispensable for the national and international democratic order. The right of freedom of opinion and expression necessarily includes the right to be wrong. "Memory laws",[14] which pretend to crystalize history into a politically correct narrative, and penal laws enacted to suppress dissent are anti-democratic, offend academic freedom and endanger not only domestic but also international democracy (see A/HRC/24/38, para. 37);

(w) States have a duty to protect and preserve nature and the common heritage of humankind for future generations.

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[13] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14. Available at www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf.

[14] Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 49.

## III. Obstacles to and recommendations for the progressive achievement of a democratic and equitable international order

15. Since the beginning of the mandate, the Independent Expert has consulted with members of permanent missions, intergovernmental organizations and NGOs, think tanks and the academic communities of several countries in order to learn what they perceive as obstacles to a more democratic and equitable world order. As many observers have pointed out, the prevailing neo-liberal economic model, which focuses on competition instead of cooperation and on short-term profit rather than long-term development, risks sacrificing inclusive development for exclusive economic growth. The deregulation of trade, markets and financial services has fuelled financial speculation and institutionalized corporate impunity on an international scale, with devastating human rights consequences in terms of corruption, labour exploitation, economic inequality, environmental degradation and corporate abuse. In addition, as economists have warned, current manifestations of extreme, free-market capitalism only function with continuous, inequitable levels of growth, which cannot be indefinitely sustained. The resulting boom and bust cycles have caused untold misery to billions of human beings, and future major financial crises and economic depressions cannot be excluded.[15]

16. There have been many proposals for overcoming some of these obstacles, including through the adoption of binding international standards and the ratification of a binding instrument for transnational corporations, setting out their social and environmental obligations. The Independent Expert has supported this proposal — particularly given the so-far unsatisfactory outcomes of self-regulatory frameworks on business and human rights. The Independent Expert has further called for the future instrument to be equipped with appropriate enforcement mechanisms. Beyond this, at the national level, States should develop and enforce civil and penal sanctions for business activity that has criminal consequences or results in adverse human rights impacts. It is regrettable that efforts at the United Nations to call on transnational corporations to show due diligence have largely failed and that the drafting of a legally binding instrument has not enjoyed the support of many developed States.

17. Secondly, considering that trillions of dollars will be required to address the consequences of climate change and the achievement of the Sustainable Development Goals, the Independent Expert has encouraged States to significantly reduce military budgets and transform military economies into peacetime economies equipped to finance climate change mitigation and the improvement and expansion of social services. To this end, in his 2014 report to the Council (A/HRC/27/51), the Independent Expert proposed that States develop conversion strategies[16] to reorient resources formerly used for military expenditure towards social services, the creation of employment in peaceful industries and greater support to the post-2015 development agenda.

18. In the same vein, the Independent Expert has condemned tax evasion and tax avoidance practices as robbing Governments of funding that might otherwise be directed to fulfilling positive human rights obligations. In his 2016 report to the General Assembly (A/71/286), for example, the Independent Expert called on States to ensure individuals and corporations pay their fair share of taxes, including by recovering back taxes, repatriating kleptocrat deposits abroad, abolishing tax havens, adopting effective measures to outlaw the registration of fake companies and banning profit-shifting by corporations. Moreover, the adoption of tax legislation on financial transactions in Member States would be a significant step towards ensuring States can finance programmes to achieve the Sustainable Development Goals and take other measures to advance the right to development.

[15] See www.theguardian.com/commentisfree/2016/sep/19/its-time-to-junk-the-flawed-economic-models-that-make-the-world-a-dangerous-place.

[16] See www.ips-dc.org/blog/demilitarizing_the_economy_a_movement_is_underway.

19. Going further, the Independent Expert has advocated for increased transparency at national and international levels in the tax arena. In his 2016 report to the Council (A/HRC/33/40), in particular, the Independent Expert recommended that the United Nations adopt an international standard for multilateral, automatic exchange of tax information among States. In addition, States had been encouraged to develop public registries of ultimate beneficial ownership. Furthermore, given the role whistle-blowers play in equalizing the playing field in the international economic order, the Independent Expert emphasized the importance of protecting individuals who shared information about rights-abusing corporate tax practices from prosecution and reprisals. In particular, in the 2016 report, the Independent Expert proposed the adoption of a charter on the rights of whistle-blowers and the development of a "protected disclosure defence" in case tax whistle-blowers were subject to criminal prosecution.

20. International institutions may themselves present obstacles to the achievement of a democratic and equitable international order. In his reports to the Council and the General Assembly in 2015, 2016 and 2017, the Independent Expert showed that certain rules of WTO and practices of the World Bank and IMF were rigged in favour of the powerful, impeded a level playing field and actually contributed to a widening gulf between the rich and the poor, both nationally and internationally.

21. For example, the World Bank's near-exclusive focus on growth in terms of gross domestic product, increased trade and greater consumption has led its member States to undertake policies that increase inequalities among their populations and between these countries and other States. At the same time, the Bank's continued financing of mega-projects connected to alleged human rights violations has counteracted its stated commitment to international development in partner countries. Among the most egregious violations documented by human rights organizations and Bank observers have been land-grabbing, brutal evictions, involuntary resettlement, forced labour, child labour, sexual abuse, massive pollution, destruction of the environment, reprisals against human rights defenders, corruption and money-laundering.

22. In a similar manner, the strict and selective loan conditions imposed by IMF, such as the requirement that States demonstrate rapid economic growth after borrowing from the Fund, has discouraged States from making long-term investments in their health, infrastructure, education and social sectors. Furthermore, the lack of a global consensus on sovereign debt restructuring means that States that are not in a position to pay back IMF loans may fall into vicious debt crises. Together, these factors increase unemployment, worsen working conditions, reduce access to free quality education and weaken environmental protection. In a systematic sense, they also diminish the capacity of States to guarantee rights and can lead to underresourced public sectors that are vulnerable to breakdowns and emergencies.

23. In his 2017 reports to the Council (A/HRC/36/40 and Corr.1) and the General Assembly (A/72/187), the Independent Expert accordingly recommended that both the World Bank and IMF amend their founding Articles of Agreement to expressly integrate human rights in their policies and practices. He suggested that both institutions conduct human rights impact assessments to analyse the potential negative effects of financed projects or partnerships and expand the scope of their work to include more wholesale evaluations of their effect on the distribution of wealth, food security, clean water, sanitation, health care, housing, education and employment.

24. As regards the World Bank, the Independent Expert has urged it to develop a standalone human rights policy and strengthen recently adopted safeguards under its new Environmental and Social Framework. Bank projects affecting the livelihoods and land of indigenous peoples should not be carried out without the genuine, free, prior and informed consent of the affected communities. Moreover, the Independent Expert has proposed that recommendations made by the Bank's own internal watchdogs — namely, the Office of the Compliance Advisor Ombudsman and the Inspection Panel — be made enforceable. Finally, the Independent Expert has called on the World Bank to guarantee that, when its projects lead to human rights violations or environmental damage, recourse mechanisms are both accessible and effective for victims, and that they provide meaningful restitution.

25. In contrast to the privatization, austerity and market-based solutions that characterize traditional loan conditions imposed on borrowing States, in his 2017 report to the General Assembly, the Independent Expert proposed that IMF place new, human rights-conscious conditions on borrower countries. These conditions would be aimed at generating revenue that could be used to pay back loans, while not obliging borrower States to divert funds from social spending. The new conditions include moratoriums on military spending (except on salaries and pensions) for the duration of the loan; adoption of national legislation ensuring transnational corporations pay their taxes, while profit-shifting and tax havens are outlawed; adoption of legislation imposing fines on persons and corporations that evade taxes and obliging citizens who have money hidden offshore to repatriate their wealth within a defined period of time or face penal sanctions; adoption of legislation to prevent corruption and bribes, accompanied by effective monitoring mechanisms; enactment of financial transactions tax legislation; and assurances by borrower States that no part of any loan is used to satisfy claims by vulture funds.

26. Yash Tandon reminds us in his book *Trade is War*[17] that, historically, trade disputes have led to armed conflict, and that nations and peoples can find themselves exploited as a consequence of international agreements that violate their human dignity. In reports on bilateral investment treaties and free trade agreements, the Independent Expert has argued that the investor-State dispute settlement system has subverted the rule of law by creating a parallel system of dispute settlement, which is not transparent, accountable or even independent, and thus cannot be tolerated. Moreover, under the investment court system, States would remain vulnerable to the same kind of frivolous and vexatious claims that have characterized the hugely expensive, slow and unpredictable investor-State dispute settlement litigation. Important issues of constitutionality and the rule of law arise when non-State actors exercise prerogative powers beyond public control and judicial scrutiny

27. In addition to urging the abolition of the investor-State dispute settlement system, the recommendations of the Independent Expert related to the international trade and investment regime include calls for WTO to amend its constitution to integrate human rights, proposals on guidelines for trade dispute tribunals and calls for States to abolish trade asymmetries and arbitrariness in policies concerning agricultural subsidies.

28. With regard to a more democratic international order, the Independent Expert has further signalled the need to reform the United Nations and, in particular, the composition of the Security Council, in order to make it more responsive to the needs of its 193 States Members. Observers have pointed out that the theoretical equality of the Westphalian State system is put into question by the realities of power politics, economic imbalances, the sequels of colonialism and "unequal treaties", and adverse trade relationships. Indeed, the overwhelming economic power of some countries renders illusionary the aspirations of sovereignty of many poorer countries. In the United Nations, votes are often influenced by economic carrot-and-stick practices, meaning some smaller economies find themselves involuntarily bending to economic and political pressure.

29. In his 2013 report to the General Assembly (A/68/284), the Independent Expert recommended strengthening global governance by expanding the membership of the Security Council, limiting the veto power of permanent members by requiring at least two votes to exercise it and obliging vetoing States to report their rationales to the General Assembly. This would prevent the use of veto power to shield States from criticism or multilateral sanctions. Critics have also proposed to shut down costly international penal tribunals, including the International Criminal Court, because of outcomes that are sometimes one-sided, arbitrary and have not managed to pierce the veil of impunity shielding powerful perpetrators of international crimes. It is far more important to systematize and strengthen truth commissions and to create effective mechanisms to provide reparation to victims.

30. The relative powerlessness of indigenous persons, and non-represented and disempowered peoples vis-à-vis States in global decision-making was an obstacle that was

[17] *Trade is War: The West's War Against the World* (New York, OR Books, 2015).

highlighted early on in the history of the mandate. In his 2013 report to the General Assembly, the Independent Expert recommended the reactivation of the Trusteeship Council in order to advance the self-determination of many indigenous and non-self-governing peoples. He also proposed that the Special Committee on Decolonization and other United Nations organs accept and review communications sent to them by indigenous and unrepresented peoples, with reference to chapter XI of the Charter. Moreover, the General Assembly was encouraged to amend its rules and procedures to allow for greater participation of indigenous and non-represented peoples in international debates.

31. More generally, an epistemological obstacle persists concerning the postulate of a hierarchy of human rights as one of the remaining ideological debates between developed and developing countries. It is the considered view of the Independent Expert that civil, cultural, economic, political, and social rights are not only interdependent, but they also have equal value and importance (see annex I below).

32. A democratic and equitable international order can only flourish in a peaceful environment. With conflict prevention being the overarching raison d'être of the United Nations, the hundreds of wars since 1945 indicate that the Organization must reform in order to live up to its purposes and principles. For that reason, war and war-mongering (prohibited by Article 2 (4) of the Charter and article 20 (1) of the International Covenant on Civil and Political Rights) must be banned. Moreover, the so-called "responsibility to protect doctrine" should be discarded and replaced by the principle of the responsibility to act in the public interest (see A/HRC/33/40, paras. 13–17). The responsibility to protect should not be seen as replacing the *jus cogens* prohibition of the use of force contained in Article 2 (4) of the Charter. Furthermore, under no condition should it be tolerated that a State unilaterally invoke the right to protect without Security Council approval. Instead, the Independent Expert has proposed that a standing group — administered by the United Nations and deployed by the Security Council, which receives its troops and support from current Security Council members — is ready for rapid deployment in the event of violations of Article 2 (4) or future grave human rights abuses.[18]

33. The Independent Expert has also illustrated the relationship between aspirations for fulfilment of the right of self-determination and present-day challenges to peace and security (A/69/272). As a point of fact, the post-colonial world left a legacy of frontiers that do not correspond to ethnic, cultural, religious or linguistic criteria. This has been a continuing source of tension that may require adjustment in keeping with Article 2 (3) of the Charter. The doctrine of *uti possidetis* is obsolete and its maintenance in the twenty-first century without the possibility of peaceful adjustments may perpetuate human rights violations. Thus, the implementation of the right of self-determination is not exclusively within the domestic jurisdiction of the State concerned, but is a legitimate concern of the international community.

[18] See the debate in the General Assembly on 23 July 2009, summarized in my 2012 report to the Assembly (A/67/277). Contrary to some trends and perceptions, the idea of the responsibility to protect, contained in General Assembly resolution 60/1 (2005 World Summit Outcome), did not replace the Charter-mandated international law of non-interference in the internal affairs of sovereign States. The responsibility to protect is not a *lex specialis* that derogates from Article 2 (3), (4) and (7) or any other provision of the Charter. The principle of non-intervention remains very much valid and is confirmed in countless resolutions of the Assembly and the Human Rights Council. Therefore, responsibility to protect cannot circumvent the Charter or engage in sabre-rattling or propaganda for war. At the plenary debate on the responsibility to protect, the President of the Assembly identified four benchmark questions that should determine whether and when the system of collective security could invoke the responsibility to protect: (a) Do the rules apply in principle, and is it likely that they will be applied in practice equally to all States, or, in the nature of things, is it more likely that the principle would be applied only by the strong against the weak? (b) Will the adoption of the responsibility to protect principle in the practice of collective security be more likely to enhance or undermine respect for international law? (c) Is the doctrine of responsibility to protect necessary and, conversely, does it guarantee that States will intervene to prevent another situation like the one that occurred in Rwanda? (d) Does the international community have the capacity to enforce accountability upon those who might abuse the right that the responsibility to protect principle would give States to resort to the use of force against other States?

34. At the same time, the right of self-determination is neither self-executing nor automatic. Recognizing this, the Independent Expert set out, in his 2014 thematic report to the General Assembly (A/69/272), a set of criteria proposing circumstances in which the right of self-determination was at issue and processes by which it could be fulfilled. For example, the Independent Expert indicated that neither the right of self-determination nor the principle of territorial integrity was absolute. Both must be applied in the context of the Charter and human rights treaties. Furthermore, the principle of territorial integrity cannot be used as a pretext to undermine the State's responsibility to protect the human rights of the peoples under its jurisdiction. The full enjoyment of human rights by all persons within a State and peaceful coexistence among States are the principal goals that need to be achieved. Guarantees of equality and non-discrimination are necessary for the internal stability of States, but non-discrimination alone may not be enough to keep peoples together. The principle of territorial integrity is not sufficient justification to perpetuate situations of internal conflict that may erupt in civil war and threaten regional and international peace and security.

35. Importantly, any process aimed at self-determination should be accompanied by the participation and consent of the peoples concerned. Thus, a reliable method of determining public opinion and avoiding manufactured consent must be devised to ensure the authenticity of the expression of public will in the absence of threats of or the use of force. In addition, while it is possible to reach solutions that guarantee self-determination within an existing State entity, e.g. autonomy, federalism and self-government, if there is a compelling demand for separation, it is extremely important to avoid the use of force, which would endanger local, regional and international stability and further erode the enjoyment of other human rights. Therefore, good-faith negotiations and a readiness to compromise are necessary; in some cases, these could be coordinated through the good offices of the Secretary-General and the High Commissioner for Human Rights or under the auspices of the Security Council or the General Assembly. The Independent Expert has also advocated for the United Nations to provide advice and technical assistance to States on viable models of autonomy, federalism and, eventually, referendums.

36. Unilateralism is one of the most serious obstacles to achieving a just world order. But even groups of States can undermine the international order when they refuse to apply international norms uniformly and apply them à la carte in order to satisfy economic or geopolitical interests. Frequently, States perceive human rights as a nuisance or a hindrance to their freedom of action. Thus, a democratic and equitable order is threatened when government lawyers often try to escape clear obligations by engaging in unacceptably narrow (or broad) interpretations of international legal norms.

37. Lawyers have been called "pens for rent" and "intellectual mercenaries". Government lawyers have special responsibilities and should not act like "escape artists". They should endeavour to see their role as that of facilitators of enforcement of just laws both nationally and internationally. They should devote their efforts to translating international commitments into concrete action and crafting the necessary measures to comply with treaties and the rules of international judicial bodies. Alas, many government lawyers mistake their vocation for that of defence lawyers, paid to get their guilty clients off the hook. It is not their function to look for ways to dodge responsibility by concocting specious interpretations of the law, making bogus distinctions or inventing loopholes. Would it not be more sensible if lawyers endeavoured to make human rights law implementable — and not constantly try to drill holes into the vessel of human dignity?

38. Sterile legalisms, the fetishism of law — otherwise known as the doctrine of positivism — have emerged as a serious impediment to a world order based on the rule of law, which must also be the rule of justice (see annex II below). Alas, Governments and private sector actors, including transnational corporations, sometimes abuse the law to destroy justice.

39. To strengthen the international rule of law and multilateral law-making, the Independent Expert has recommended amendments to the Charter and the statute of the International Court of Justice, which would bolster the Court, giving the Court the necessary power to initiate the issuance of advisory opinions without being asked by the Security Council or General Assembly, and creating an enforcement mechanism for its

judgments and advisory opinions. Furthermore, calls for a yet-to-be-established world parliamentary assembly or a United Nations parliamentary assembly seek to address international democratic deficits and give expression to global public opinion by including all citizens in global decision-making through the designation of representatives specifically elected for this purpose.

40. Finally, a high level of institutional inertia cripples action to overcome the aforementioned obstacles. Even within the United Nations, which is a human institution, there are various degrees of commitment to human rights, and because of the inefficiency of some of its organs and the lack of enforcement of its resolutions, it has lost much credibility with civil society in many countries. The Independent Expert lends his encouragement to future mandate-holders as they push forward the cause of sanity and human dignity for all.

# IV. Recommendations from some of the previous reports of the Independent Expert

## A. Reform of the Organization and its agencies

41. In his 2013 report to the General Assembly, the Independent Expert recommended expanding the membership of the Security Council, limiting the veto power by requiring at least two permanent members of the Security Council to vote against a given resolution and obliging those States to report to the General Assembly on the reasons for the veto. The veto should be allowed only to promote peace and pursue the purposes and principles of the United Nations. The use of the veto power to shield States from criticism or sanctions is illegitimate. This may require an advisory opinion from the International Court of Justice or an amendment of Article 27 of the Charter. As mentioned above, the International Court of Justice should be empowered to issue advisory opinions separate from those requested by the Security Council and the General Assembly. Moreover, it should be equipped with a mechanism to enforce its judgments and advisory opinions.

42. The Independent Expert proposes the abolition of wasteful and arbitrary international penal tribunals, because they are only used to prosecute the losers and institutionalize impunity of the powerful. The International Criminal Court has proven to be too expensive and arbitrary. The campaign against the "impunity" of criminals has legitimacy only when it is impartial and when it endeavours to indict all persons suspected of war crimes — and not only and overwhelmingly the vanquished, whereas many others, sometimes even worse war criminals, are not even accused. It is far more important to systematize and strengthen truth commissions and to create effective mechanisms to provide adequate reparation to victims.

## B. International order and indigenous peoples

43. In his 2013 report to the General Assembly, the Independent Expert recommended the reactivation of the Trusteeship Council so as to facilitate the exercise of self-determination by many indigenous and non-self-governing peoples. The United Nations should offer its advisory services and technical assistance so as to conduct United Nations organized and monitored self-determination referendums. In paragraph 69 (n) of his report, the Independent Expert recommended specifically that the General Assembly revisit the reality of self-determination in today's world and refer to the Special Committee on Decolonization and/or other United Nations instances communications by indigenous and unrepresented peoples wherever they reside, with reference to chapter XI of the Charter. The General Assembly may also consider amending its rules and procedures to allow for the participation of indigenous and non-represented peoples. Meanwhile, the Assembly should urge States to implement the Declaration on the Rights of Indigenous Peoples. It should ensure that indigenous, non-represented peoples, marginalized and disempowered peoples, and peoples under occupation have a genuine opportunity to participate in decision-making processes.

## C. Disarmament for development

44. In his 2014 report to the Council, the Independent Expert recommended a gradual reduction of military expenses and a conversion of the military economy into a peacetime economy: not more consumer goods, since there is a limit to what people need and can consume, but improvement and expansion of social services — education, health care, clean water, food security and national parks. In paragraph 71 of the report, he recommended that States should significantly reduce military spending and develop conversion strategies to reorient resources towards social services, the creation of employment in peaceful industries, and greater support to the post-2015 development agenda. States should individually and multilaterally devote savings released from reduced military spending to resourcing the economic and social transition required to respond to the global climate change challenge, as envisaged by the United Nations in establishing the Green Climate Fund pursuant to the United Nations Framework Convention on Climate Change. Furthermore, a portion of the financial resources released should be devoted to research and development of sustainable energy, including solar energy, and should be used to address the looming problem of water shortage, which has the potential to fuel future wars. An international effort to develop efficient desalination industries should be envisaged.

## D. Criteria for the exercise of self-determination

45. The General Assembly, in its resolution 2625 (XXV), repeatedly reaffirmed the right of self-determination and stipulated that the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination.

46. In his 2014 report to the General Assembly, the Independent Expert focused on the criteria for the exercise of the right of self-determination (see A/69/272, paras. 63–77). The following paragraphs contain certain central ideas taken from that report.

47. The right is not extinguished by the lapse of time because, just as in the case of the rights to life, freedom and identity, it is too important to be waived. All manifestations of self-determination are on the table: from a full guarantee of cultural, linguistic and religious rights, to various models of autonomy, to special status in a federal State, to secession and full independence, to unification of two State entities, to cross-border and regional cooperation.

48. The implementation of self-determination is not exclusively within the national jurisdiction of the State concerned, but is a legitimate concern of the international community.

49. International law evolves through practice and precedents. The independence of the former Soviet republics and the secession of the peoples of the former Yugoslavia created precedents for the implementation of self-determination that must be considered whenever self-determination disputes arise.

50. The aspiration of peoples to fully exercise the right of self-determination did not end with decolonization. There are many indigenous peoples, non-self-governing peoples and populations living under occupation who still strive for self-determination. Their aspirations must be taken seriously for the sake of conflict prevention. The post-colonial world left a legacy of frontiers that do not correspond to ethnic, cultural, religious or linguistic criteria. This is a continuing source of tension that may require adjustment in keeping with Article 2 (3) of the Charter. The doctrine of *uti possidetis* is obsolete and its maintenance in the twenty-first century without the possibility of peaceful adjustments may perpetuate human rights violations.

51. The United Nations could be called upon to assist in the preparation of models of autonomy, federalism and, eventually, referendums. A reliable method of determining public opinion and avoiding manufactured consent must be devised so as to ensure the

authenticity of the expression of public will in the absence of threats of or the use of force. Long-standing historical links to a territory or region, religious links to sacred sites, the consciousness of the heritage of prior generations, as well as a subjective identification with a territory, must be given due weight.

52. Agreements with persons who are not properly authorized to represent the populations concerned and *a fortiori* agreements with puppet representatives are invalid. In the absence of a process of good-faith negotiation or plebiscites, there is a danger of armed revolt. A consistent pattern of gross and reliably attested violations of human rights against a population negates the legitimacy of the exercise of governmental power. In case of unrest, dialogue must first be engaged in the hope of redressing grievances. States may not first provoke the population by committing grave human rights abuses and then invoke the right of self-defence in justification of the use of force against them. That would violate the principle of estoppel. No doctrine, not that of territorial integrity nor that of self-determination, justifies massacres; neither doctrine can derogate from the right to life. Norms are not mathematics and must be applied with flexibility and a sense for proportionality in order to reduce and prevent chaos and death.

53. Secession presupposes the capacity of a territory to emerge as a functioning member of the international community. In this context, the four statehood criteria of the Montevideo Convention on the Rights and Duties of States are relevant: a permanent population; a defined territory; government; and the capacity to enter into relations with other States. The size of the population concerned and the economic viability of the territory are also relevant. A democratic form of government that respects human rights and the rule of law strengthens the entitlement. The recognition of a new State entity by other States is desirable but it has a declaratory, not a constitutive effect.

54. When a multi-ethnic and/or multi-religious State entity is broken up, and the resulting new State entities are also multi-ethnic or multi-religious and continue to suffer from the old animosities and violence, the same principle of secession can be applied. If a piece of the whole can be separated from the whole, then a piece of the piece can also be separated under the same rules of law and logic. The main goal is to arrive at a world order in which States observe human rights and the rule of law internally and live in peaceful relations with other States.

## E. World parliamentary assembly in consultative status with the General Assembly

55. For many decades, the idea of a world parliamentary assembly[19] or a United Nations parliamentary assembly has been under discussion. The idea is to address democracy deficits by giving expression to global public opinion and including citizens in global decision-making through elected officials. Such an assembly could be set up by a vote of the General Assembly under Article 22 of the Charter, or it could be created on the basis of a new international treaty between Governments, followed by an agreement linking it to the United Nations. Neither mechanism requires Charter reform. Former Secretary-General Boutros Boutros-Ghali has been an advocate of such an assembly. In a comment published at Open Democracy, Mr. Boutros-Ghali made the case for the establishment of a parliamentary assembly at the United Nations. In order to solve global crises more effectively, a direct democratic connection between the world's citizens and the world's governance needs to be created. He welcomed the expansion of democracy at the national level throughout the world, observing that emerging States are increasingly included in

[19] See A/68/284, Joseph E. Schwartzberg, *Creating a World Parliamentary Assembly: An Evolutionary Journey*, (Berlin, Committee for a Democratic United Nations, 2012), and Richard Falk and Andrew L. Strauss, "Toward global parliament", *Foreign Affairs*, 2001

global intergovernmental deliberations. He noted, "a third dimension of democratization is almost completely neglected: developing global democracy beyond States".[20]

## F. Investor-State dispute settlement arbitrations

56. In his 2015 report to the Council (A/HRC/30/44 and Corr.1), the Independent Expert recommended that States should impose a moratorium on the execution of investor-State dispute settlement awards until the entire system was tested by the International Court of Justice. A new multilateral treaty should be elaborated stipulating that courts could not execute such awards without verifying their compatibility with human rights treaty obligations and public order. States should refrain from entering into new bilateral investment treaties and free trade agreements, including the Trans-Pacific Partnership Agreement,[21] the Transatlantic Trade and Investment Partnership, the Comprehensive Economic and Trade Agreement and the Trade in Services Agreement, unless human rights, health and environmental impact assessments had been conducted, and unless there was full disclosure, consultation with stakeholders and public participation. Where possible, referendums should be conducted.

## G. International trade and the growing power of transnational corporations

57. Yash Tandon reminds us in his book *Trade is War* that, historically, trade disputes have led to armed conflict. Indeed, trade is a means to impose economic and political dominance.[22]

58. In his reports on bilateral investment treaties and free trade agreements, the Independent Expert recommended that the General Assembly invite the United Nations Conference on Trade and Development to convene a conference to revise or terminate international investment agreements that had resulted in human rights violations. The General Assembly might consider tasking the Council with a specific mandate on periodic monitoring of the adverse impacts of the international investment regime on the enjoyment of civil, cultural, economic, political and social rights, for example by expanding the scope of examination under the universal periodic review (see A/70/285, paras. 66–67).

## H. A treaty making the Guiding Principles on Business and Human Rights binding

59. There are many solid studies concerning massive human rights violations committed by transnational corporations with total impunity. The Council should, as a matter of urgency, adopt a legally binding convention on corporate social responsibility, imposing civil and penal liability on transnational corporations. The Guiding Principles on Business and Human Rights, developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, are ineffective because they are based on self-regulation and lack any enforcement mechanism.

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[20] See http://en.unpacampaign.org/225/boutros-ghali-parliamentary-assembly-inevitable-to-democratize-global-governance. Joseph Schwartzberg writes in *Creating a World Parliamentary Assembly*: "Our increasingly interdependent world can no longer function without an effective UN system. But for a variety of reasons — mainly related to the obsolescent mindsets and dubious diplomatic practices of a world still guided mainly by Realpolitik — a large proportion of the human family has lost faith in the UN. ... A democratically constituted WPA will go far toward correcting these deficiencies and would do much to promote more legitimate, transparent, representative, accountable and responsive governance" (p. 96).

[21] Its successor, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, seems to suffer from the same fundamental problems as the original Partnership.

[22] See also the history of the Opium Wars to force the opening of China to European trade in Jack Beeching, *The Chinese Opium Wars* (Orlando, Florida, Harcourt Brace Jovanovich, 1975).

60. A democratic and equitable international order, as prescribed in the Charter, cannot be achieved through deregulation of trade, markets and financial services. While enterprises deserve protection from corrupt Governments and arbitrary expropriations, Governments also need protection from bribery and corruption by investors, speculators and transnational corporations. Individuals and peoples deserve protection and remedies against corporate abuse, land-grabbing and exploitation. Observers have long decried the anomaly that, while businesses have secured privileged protection of their investments and have created privatized arbitral tribunals to enforce their view of the law, there is no tribunal to protect Governments from business abuse and no protection of individual victims from the negative consequences of business activities. That normative asymmetry must be corrected. Fifty years after the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, there is still no enforcement mechanism. That reduces the credibility of United Nations institutions that continue adopting Views, declarations and resolutions, which many States and non-State actors ignore. While there are enforcement mechanisms for trade and other agreements at WTO and investor-State dispute settlement, it is imperative to create them globally for human rights treaties. The promise of the United Nations Global Compact and the Guiding Principles on Business and Human Rights has not been realized, simply because self-regulation never works.

61. Binding obligations on investors and corporations must be incorporated into trade and investment agreements, and public courts must have jurisdiction to examine violations and impose sanctions on violators. Although the Guiding Principles are based on hard law, they are violated with impunity, as illustrated by bilateral investment treaties and free trade agreements that encroach into the regulatory space of States. The treaty should provide for its own monitoring and enforcement body or be incorporated into the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as optional protocols, stipulating that decisions are legally binding, as are those of the Inter-American Court of Human Rights and the European Court of Human Rights. States must enact civil and penal legislation concerning the human rights impacts of business activity; the doctrine of State responsibility should be invoked to make abuses justiciable where the enterprises operate or are registered. In June 2014, the Human Rights Council adopted resolution 26/9 creating an intergovernmental working group with a mandate to draft such an instrument. The Forum on Business and Human Rights contributes to that process.

62. Beyond the treaty, there is an urgent need to strengthen national and international penal law, including anti-trust legislation, to address cases of corruption, fraud, bribery, money-laundering, conspiracy, collusion, tax evasion, insider-trading, looting of pension funds, and reckless endangerment of life and the environment. In that context, the United Nations Convention against Corruption and the United Nations Office at Vienna could advance the process. Also pertinent is the United Nations Convention against Transnational Organized Crime, as certain activities of mining enterprises, including gold, diamond and coltan mining, as well as the ivory trade, entail criminal acts and gross human rights violations.

## I. Tax evasion and tax havens

63. In paragraph 71 of his 2016 report to the General Assembly (A/71/286), the Independent Expert focused on the negative impact of tax evasion, profit-shifting and tax competition on the common effort to achieve a more democratic and equitable world order. He recommended, inter alia, that States should: (a) establish an intergovernmental tax body under the auspices of the United Nations with the mandate to elaborate a convention on taxation and international cooperation in tax matters; (b) adopt a common United Nations standard for multilateral and automatic exchange of tax information; (c) implement corporate tax and financial transparency, including public registries of ultimate beneficial ownership; (d) ensure that multinational corporations are treated as single entities conducting business across international borders; (f) abolish "sweetheart" tax deals; member States of the European Union should revise the Code of Conduct for business

taxation to specifically prohibit "sweetheart" deals; (g) conduct systematic human rights impact assessments to monitor the spillover effects of their tax policies and agreements nationally and overseas (these should be periodic and independently verified); (h) impose criminal penalties for abusive tax practices and abolish tax amnesties; (i) enact legislation to protect whistle-blowers and witnesses, and ensure that individuals who want to share information about corporate tax practices that harm human rights are not prosecuted or subjected to reprisals; States should cease punishing individuals for disclosing information that the public has a right to receive pursuant to article 19 of the International Covenant on Civil and Political Rights. A charter on the rights of whistle-blowers and a "protected disclosure defence" should be adopted, pursuant to which criminal or civil liability for protected disclosures is waved and an "authorized channel" is provided for such disclosures; and (j) introduce a financial transactions tax and enforce it.

## J. International financial institutions

64. In his 2017 reports on the World Bank and IMF, the Independent Expert called upon both Bretton Woods institutions to amend their Articles of Agreement so as to better serve the purposes and principles of the United Nations, precisely because some of their activities had entered into conflict with the human rights and development goals of the United Nations.

65. The Independent Expert recommended that both institutions should amend their Articles of Agreement so as to integrate human rights and require human rights, health and environmental impact assessments before approving projects or loans. He also recommended the abolition of the World Bank's International Centre for Settlement of Investment Disputes (A/HRC/30/44).

66. He proposed that the General Assembly take appropriate measures to bring the World Bank and IMF on board, so that they worked for development and human rights and assisted the world community in the achievement of the Sustainable Development Goals, solving global problems, including pandemics, climate change and sovereign debt.

67. In his report, he also called on IMF to abandon its misguided prioritization of economic growth above all other considerations, including human rights and the environment. Indeed, there is evidence that, within the institution, broader considerations, including income and gender inequalities, are already being discussed. In June 2016, the research department of IMF produced a paper, entitled "Neoliberalism oversold?", in which it questioned the efficacy of the current guiding ideology of IMF. The authors begin with the ominous finding that, "instead of delivering growth, some neoliberal policies have increased inequality, in turn jeopardizing durable expansion", and concluding that the current policies did not deliver as expected.[23]

68. The strict and selective loan conditions imposed by IMF, such as the requirement that States demonstrate rapid economic growth, discourages States from making long-term investments in health, education and public infrastructure. Furthermore, the lack of a global consensus on sovereign debt restructuring means that States that are not in a position to pay back loans may fall into vicious debt crises. Together, these factors can increase unemployment, worsen working conditions, reduce access to free quality education and weaken environmental protection. In a systematic sense, they also diminish the capacity of States to guarantee rights and can lead to underresourced public sectors that are vulnerable to breakdowns and emergencies.

69. At this year's spring meeting of the World Bank and IMF, the Independent Expert had the opportunity to discuss a variety of issues with lawyers and economists at both

[23] Jonathan D. Ostry, Prakash Loungani and Davide Furceri, "Neoliberalism: oversold?", *Finance and Development*, vol. 53, No. 2 (June 2016). Available at www.imf.org/external/pubs/ft/fandd/2016/06/pdf/ostry.pdf. See also Rick Rowden, "The IMF confronts its N-word", *Foreign Policy*, 6 July 2016. Available at http://foreignpolicy.com/2016/07/06/the-imf-confronts-its-n-word-neoliberalism.

institutions. He is persuaded that IMF must change its priorities, give up the outdated loan conditions of privatization, deregulation of markets and "austerity" in social services, which in the past have resulted in human rights violations, including in Greece, Argentina and Tunisia, to name but a few.

70. Bearing in mind that power dynamics are changing, it is time for the World Bank and IMF to discover a new vocation to promote development and human rights through "smart" lending practices that benefit not only banks and speculators, but billions of human beings.

71. Henceforth, IMF should make loans subject to a new set of conditions, including:

(a) A moratorium on military expenditure for the duration of the loan;

(b) Adoption of national legislation that ensures that national and transnational corporations pay their taxes, while profit-shifting and tax havens are outlawed;

(c) Adoption of legislation imposing fines on persons and corporations that evade taxes and obliging citizens who have money hidden offshore to repatriate their wealth within a defined period of time, or face penal sanctions;

(d) Adoption of legislation to prevent corruption and bribes, accompanied by effective monitoring mechanisms;

(e) Enactment of financial transactions tax legislation;

(f) Assurances by borrower States that no part of any loan would be used to satisfy claims by vulture funds.

72. These proposals would enable States to generate revenue to pay back IMF loans and satisfy the legitimate concerns of creditors. At the same time, they would ensure that States can continue to meet their human rights obligations and fulfil the Sustainable Development Goals.

73. The human rights dimension in lending can no longer be ignored. No international financial institution, no transnational corporation and no trade agreement is above international law. All must respect the overarching international human rights treaty regime.

74. Implementing these recommendations will benefit the entire human family. Only through the concerted efforts of IMF and the World Bank — together with the United Nations — will a more democratic and equitable international order emerge.

### K. Gender equality

75. It is high time that a woman be elected Secretary-General and that a woman be elected President of the General Assembly.

## V. Conclusions and recommendations

76. **The Independent Expert wishes to reaffirm his commitment to strengthening the special procedures of the Human Rights Council, which have proven their worth over the past decades. As a mandate holder, the Independent Expert is required to be independent, which means always ready to listen to all stakeholders, keeping an open mind, conducting research objectively and without ideological prejudices, consistent with the principle *audiatur et altera pars*, and impervious to the pressures of political correctness and to self-censor. The essence of an independent expert is not merely his or her expertise — which must be considered a given — but the faculty to think inside and outside the box, while rigorously respecting the terms of reference laid down in the resolution establishing the mandate, and observing the code of conduct. While inevitably belonging to a certain cultural and educational background, the rapporteur must be able to jump over his or her own shadow and get at the facts.**

77. **Naming and shaming is doomed to failure when the party doing the naming lacks moral authority and has skeletons in the closet. A more promising strategy is to**

**persuade the targeted State that it is in its own interest to reform, for which advisory services and technical assistance can be provided by the Office of the United Nations High Commissioner for Human Rights. Quiet diplomacy and mediation through the good offices of the Secretary-General can be more effective in advancing human rights and international solidarity than pointing fingers, which is not always useful as evidenced by the Human Rights Council, where serious human rights issues in some States are ignored while others receive disproportionate attention, thus weakening the institution's credibility.**

78. **It is more important to understand the root causes of violations, such as endemic inequalities, the persistence of privilege and the culture of violence. The provision of recourse and redress for the victims is also important. With this in mind, the Independent Expert has endeavoured to formulate recommendations that entail more than temporary measures and require paradigm changes. A mandate holder must have the courage to break the silence about taboo topics. He or she should give impulses and speak clear language, tear down pretences and double-standards. The rapporteur must not be the guardian of the status quo, a fig leaf for the international community, so that everybody pretends to have a good conscience and continues with "business as usual".**

79. **Hence, let us rediscover the spirituality of the Universal Declaration of Human Rights and revive the legacy of Eleanor Roosevelt, Charles Malik and Rene Cassin. We owe it to ourselves and future generations. The Universal Declaration of Human Rights was clear in bestowing upon us the collective responsibility of building a better world, which we must honour.**

80. **Mandate holders may draw inspiration from Horace's *Epistles*[24] — and the author's invocation, *sapere aude* — and use their judgment with the courage of conviction, unafraid of expressing politically incorrect views. This philosophy of conscience and moral imperative was also championed by Immanuel Kant during the Enlightenment.**

81. **In our post-modern world of nuclear weapons, artificial intelligence and killer robots, we need judgment more than ever. Back in 1933, the League of Nations invited Albert Einstein to address the vital question "Why war".[25] Answers are contained in a brilliant exchange of letters with Sigmund Freud, answers that are valid for the United Nations today. Indeed, as our colleagues at the International Labour Organization have memorably enjoined us: if we want peace, we must cultivate justice — *si vis pacem, cole justitiam*. To achieve peace and justice, we must revive multilateralism and international solidarity.**

[24] "Dimidium facti, qui coepit, habet: sapere aude, incipe" (Let's get started and then have the courage to use our judgment) (I, 2, 40).

[25] Albert Einstein and Sigmund Freud, "Why war?", *An International Series of Open Letters*, International Institute of Intellectual Cooperation, League of Nations, Paris, 1933.

# Annex I

## A new functional paradigm on human rights

1. All rights derive from human dignity. Codification of human rights is never definitive and never exhaustive, but constitutes an evolutionary *mode d'emploi* for the exercise of civil, cultural, economic, political and social rights. Alas, the interpretation and application of human rights is hindered by wrong priorities, sterile positivism and a regrettable tendency to focus only on individual rights while forgetting collective rights. Alas, many rights advocates show little or no interest for the social responsibilities that accompany the exercise of rights, and fail to see the necessary symbiosis of rights and obligations, notwithstanding the letter and spirit of article 29 of the Universal Declaration of Human Rights.

2. The time has come to change the human rights paradigm away from narrow positivism towards a broader understanding of human rights norms in the context of an emerging customary international law of human rights. Law is neither physics nor mathematics, but a dynamic human institution that day by day addresses the needs and aspirations of society, adjusting here, filling lacunae there. Every human rights lawyer knows that the spirit of the law (Montesquieu) transcends the limitations of the letter of the law, and hence codified norms should always be interpreted in the light of those general principles of law that inform all legal systems, such as good faith, proportionality and *ex injuria non oritur jus*.

3. I propose discarding the obsolete and artificial division of human rights into those of the falsely called first generation (civil and political), second (economic, social and cultural) and third generation (environment, peace, development) rights — with its obvious predisposition to favour civil and political rights. This generational divide is part of a structure that perpetuates a world order that much too often appears to allow injustice.

4. Instead I propose a functional paradigm that would consider rights in the light of their function within a coherent system — not of competing rights and aspirations, but of interrelated, mutually reinforcing rights which should be applied in their interdependence and understood in the context of a coordinated strategy to serve the ultimate goal of achieving human dignity in all of its manifestations. Four categories would replace the skewed narrative of three generations of rights.

5. First we would recognize enabling rights, among which I would list the rights to food, water, shelter, development, homeland — but also the right to peace, since one cannot enjoy human rights unless there is an environment conducive to the exercise of those rights. Article 28 of the Universal Declaration of Human Rights postulates the right of every human being "to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized". This entails the basic necessities of life and the right to a level playing field.

6. Secondly I would propose a category of inherent or immanent rights, such as the right to equality, the right to non-arbitrariness; indeed, every right necessarily contains in itself the element of equality, the self-evident requirement that it be applied equally and equitably, that there be uniformity and predictability (what the Germans call *Rechtssicherheit*). Immanent rights also encompass the rights to life, integrity, liberty and security of person, in the light of which other rights must be interpreted and applied. There are also inherent limitations to the exercise of rights. The general principle of law prohibiting abuse of rights (*sic utere tuo ut alienum non laedas* — use your right without harming others, a principle advocated by Sir Hersh Lauterpacht as an overarching norm prohibiting the egoistic exercise of rights to achieve anti-social results or unjust enrichment) means that every right, also a human right, must be exercised in the context of other rights and not instrumentalized to destroy other rights or harm others. There is no right to intransigence as we know from Shylock in the Merchant of Venice. The letter of the law must never be used against the spirit of the law.

7. Third I would propose a category of procedural or instrumental rights, such as the rights to due process, access to information, freedom of expression and peaceful assembly, work, education, social security, leisure — rights that we need to achieve our potential, to complete our personalities, to engage in the pursuit of happiness.

8. Finally I would postulate the category of end rights or outcome rights, that is, the concrete exercise of human dignity, that condition of life that allows each human being to be himself or herself. This ultimate right is the right to our identity, to our privacy, the right to be ourselves, to think by ourselves and express our humanity without indoctrination, without intimidation, without pressures of political correctness, without having to sell ourselves, without having to engage in self-censorship. The absence of this outcome right to identity and self-respect is reflected in much of the strife we see in the world today. It is through the consciousness and exercise of the right to our identity and the respect of the identity of others that we will enjoy the individual and collective right to peace (see my 2013 report to the GA A/68/284, paras. 67–68).

9. The United Nations Human Rights Council should become the international arena where governments compete to show how best to implement human rights, how to strengthen the rule of law, how to achieve social justice, where they display best practices and give life to this new functional paradigm of human rights. This kind of competition in human rights performance is the noblest goal and challenge for civilization. The Council should become the pre-eminent forum where governments elucidate what they themselves have done and are doing to deliver on human rights, in good-faith implementation of pledges, in adherence to a daily culture of human rights characterized by generous interpretation of human rights treaties and a commitment to the inclusion of all stakeholders. What the Council must not be is a politicized arena where gladiators use human rights as weapons to defeat their political adversaries and where human rights are undermined through "side shows", the "flavor of the month" or "legal black holes". The civilization model of the globalized world must not be one of positivism, legalisms and loopholes, but one of ethics, direct democracy, respect for the environment, international solidarity and human dignity.

## Annex II

### Rule of law must evolve into rule of justice

1. The rule of law is a pillar of stability, predictability and democratic ethos. Its object and purpose is to serve the human person and progressively achieve human dignity in larger freedom.

2. Because law reflects power imbalances, we must ensure that the ideal of the rule of law is not instrumentalized simply to enforce the status quo, maintain privilege, and the exploitation of one group over another. The rule of law must be a rule that allows flexibility and welcomes continuous democratic dialogue to devise and implement those reforms required by an evolving society. It must be a rule of conscience and of listening.

3. Throughout history law has been all too frequently manipulated by political power, becoming a kind of *dictatorship through law*, where people are robbed of their individual and collective rights, and the law itself becomes the main instrument of their disenfranchisement. Experience has taught us that law is not coterminous with justice and that laws can be adopted and enforced to perpetuate abuse and cement injustice. Accordingly, any appeal to the rule of law should be contextualized within a human-rights-based framework.

4. Already in Sophocles' *Antigone* we saw the clash between the arbitrary law of King Creon and the unwritten law of humanity. Enforcing Creon's unjust law brought misery to all. In Roman times the maxim *dura lex sed lex* (the law is hard, but it is the law) was mellowed by Cicero's wise reminder that *summum jus summa injuria* (highest law is highest injustice, *de Officiis* 1, 10, 33), i.e. blind application of the law may cause great injustice.

5. The argument that "the law must be obeyed" has been challenged by human rights heroes for thousands of years. Spartacus fought against the Roman slave laws and paid with his life. Slavery remained constitutional and legal until the mid-nineteenth century; colonialism was constitutional and legal until the decolonization processes of the 1950s, 1960s and 1970s; the Nuremberg laws of 1935 were constitutional and legal; *Apartheid* was constitutional and legal; segregation in the US was constitutional and legal (see, for instance, the US Supreme Court judgment *Plessy v. Ferguson*). Civil disobedience by Henry David Thoreau, Zaghloul Pasha, Michael Collins, Dietrich Bonhoeffer, Mahatma Gandhi, Martin Luther King, Nelson Mandela, Ken Saro Wiwa, Mohamed Bouazizi were legitimate and necessary to give example and initiate reforms — but they all suffered the consequences of opposing blind positivism, the *fetishism of the rule of law*.

6. Democracy in the twenty-first century requires that the rule of law cease being the rule of power, might makes right, geopolitics and economics. The rule of law must incorporate human dignity into the equation and enable people power, self-determination and referendums. The rule of law must evolve into the rule of social justice and peace.